**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

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| **KURTIS ROOKS, individually and on behalf of all others similarly situated,** | § | |
| | § | |
| **Plaintiffs,** | § | **CIVIL ACTION NO. 4:16-CV-00296** |
| **v.** | § | |
| | § | |
| **COASTAL CHEMICAL CO., LLC,** | § | |
| | § | |
| **Defendant.** | § | |

**DEFENDANT'S RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION**

Defendant Coastal Chemical Co., LLC ("Coastal") files this Response in Opposition to Plaintiff's Motion for Conditional Certification ("Motion") and respectfully shows as follows:

## I. INTRODUCTION

Plaintiff Kurtis Rooks ("Plaintiff"), who worked as a land technician, alleges that Coastal failed to pay him overtime wages as required by the Fair Labor Standards Act ("FLSA"). In his Motion, Plaintiff requests that the court conditionally certify a class of "coworkers" and authorize the distribution of a notice to potential plaintiffs. The Court should deny conditional certification.

Plaintiff's Motion is untimely. The deadline for adding parties expired nearly four months ago. Dispositive motions are due by February 6, 2017, and trial is scheduled for May 8, 2017. By waiting to file his Motion after the case had been pending more than 10 months and the deadline for adding parties had already expired, Plaintiff waived his opportunity to seek conditional certification.

In addition to seeking conditional certification months after the deadline for adding parties, Plaintiff's Motion does not define a purported class of individuals. The Motion refers to land technicians and "Putative Class Members" but does not describe with reasonable particularity the individuals to whom he seeks to send a Court-authorized notice.

Plaintiff's Motion also is not supported by any credible evidence. Plaintiff has not offered even one signed declaration. Therefore, the Court should exercise its discretion in denying Plaintiff's Motion.

## II. ARGUMENTS AND AUTHORITIES

Courts have the authority to conditionally certify a class and permit notice to the proposed class under § 216(b) of the FLSA. *Hoffman-LaRoche v. Sperling*, 493 U.S. 165 (1989). But a court's authority to conditionally certify a class and issue notice should be exercised only with discretion and only in appropriate cases. *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 521 (5th Cir. 2010); *Haynes v. Singer Co.*, 696 F.2d 884, 886 (11th Cir. 1983). The central purpose of a collective action is to allow the efficient resolution of common issues of law and fact arising from an alleged common and unlawful policy. Conditional certification is not appropriate when individual issues predominate over collective issues. Courts also have cautioned that this discretion to conditionally certify a class should be exercised in such a way as to avoid "stirring up unwarranted litigation." *H&R Block, Ltd. v. Housden*, 186 F.R.D. 399, 401 (E.D. Tex. 1999); *Lentz v. Sparky's Rest. II, Inc.*, 491 F. Supp. 2d 663, 669 (N.D. Tex. 2007).

Although the FLSA does not expressly provide for conditional certification or the distribution of judicially approved notice to putative plaintiffs, the United States Supreme Court has recognized that district courts "have discretion, in appropriate cases, to implement" the FLSA's collective action mechanism "by facilitating notice to potential plaintiffs." *Hoffman-La Roche Inc.*, 493 U.S. at 167. Courts should allow collective actions only when adjudication of "common issues of law and fact arising from the same alleged … activity" promotes efficiency and judicial economy. *Id.* at 170. Accordingly, "notice is by no means mandatory" and "the relevant inquiry in each particular case is whether it would be appropriate to exercise such discretion." *Harris v. Fee Transp. Servs., Inc.*, 2006 WL 1994586, 2 (N.D. Tex. 2006). As another district court in Texas has noted, "[t]he relevant inquiry is not whether the court has discretion to facilitate notice, but whether this is an appropriate case in which to exercise discretion." *Hall v. Burk*, 2002 WL 413901, *2 (N.D. Tex. 2002) (quoting *Camper, et al. v. Home Quality Mgmt., Inc.*, 200 F.R.D. 516, 519 (D. Md. 2000).

The analysis of whether a plaintiff is "similarly situated" to other individuals typically follows a two-step process set forth in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987); *see also Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995). The first step is called the "notice stage." *Mooney*, 54 F.3d at 1213. At the initial notice stage, plaintiffs must provide the court with some evidence showing that the defendants subjected a group of similarly-situated potential class members to a "single decision, policy or plan" violating the provisions of the FLSA. *Mooney*, 54 F.3d at 1214, n.8; *Simmons v. T-Mobile USA, Inc.*, No. H-06-1820, 2007 WL 210008, at *4 (S.D. Tex. Jan. 24, 2007). "A court may deny plaintiffs' right to proceed collectively if the action arises from circumstances purely personal to the plaintiff, and not from any generally applicable rule, policy, or practice." *Simmons v. T-Mobile USA, Inc.*, No. 06-1820, 2007 WL 210008, at *4 (S.D. Tex. Jan. 24, 2007); *Aguirre v. SBC Comm'ns, Inc.*, No. 05-3198, 2006 WL 964554, at *5 (S.D. Tex. Apr. 11, 2006). The second step of the *Lusardi* approach usually follows discovery and is triggered by a motion for decertification filed by the defendant. *Mooney*, 54 F.3d at 1214.

**A. Plaintiff's Motion should be denied as untimely.**

On May 9, 2016, the Court approved and issued a Scheduling/Docketing Control Order (Doc. 12) that had been agreed to by the parties. Under the Order, Plaintiff had until September 9, 2016 to add parties and to amend pleadings. Plaintiff, however, waited until December 13, 2016 to file his Motion. The clear purpose of the Motion is to add parties. Therefore, Plaintiff's Motion should be denied as untimely.

Plaintiff's Motion also is untimely in light of the other deadlines in the Scheduling Order. The discovery deadline is January 6, 2017, dispositive motions are due February 6, 2016, and trial is scheduled for May 8, 2017. Plaintiff's Motion ignores all of the deadlines in the Scheduling Order. Furthermore, no extraordinary circumstances are present, and Plaintiff did not even request that the Court extend these deadlines prior to filing his Motion.

"A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992). Disregard of the terms of the scheduling order "undermine[s] the court's ability to control its docket, disrupt[s] the agreed-upon course of the litigation, and reward[s] the indolent and cavalier." *Id*. The Fifth Circuit has noted that district courts have "exceedingly wide" discretion in making scheduling decisions because "in handling its calendar and determining when matters should be considered, the district court must consider not only the facts of a particular case but also all of the demands on counsel's time and the court's." *HC Gunn & Knife Shows, Inc. v. City of Houston*, 201 F.3d 544, 549-50 (5th Cir. 2000).

Accommodating Plaintiff's untimely Motion would cause substantial delay and prejudice Coastal. And there is no justification for Plaintiff's delay. Motions for conditional certification are routinely filed at the earliest stage of a case without the benefit of any discovery. Because

Plaintiff waited until the eleventh hour to file his Motion, the Court should exercise its wide discretion to deny Plaintiff's request for conditional certification.

**B. Plaintiff has not defined the "Putative Class Members."**

Plaintiff's Motion lacks a clear definition of the putative class. Plaintiff uses the phrase "Putative Class Members" several times in the Motion but fails to define the phrase. Coastal assumes Plaintiff seeks a class of "land technicians" because Plaintiff references that position in his "Summary" and "Factual Background" sections. Plaintiff, however, does not describe the geographical or temporal scope of the putative class. Without a more precise definition of the putative class, it is unclear what exactly Plaintiff seeks the Court to conditionally certify. Plaintiff's Motion is not supported by credible evidence.

**C. Plaintiff's Motion is not supported by credible evidence.**

Although the first stage of the *Lusardi* test is modest, conditional certification is not automatic. Even in cases where the parties have conducted little discovery, courts still require some evidence of a common and unlawful policy beyond conclusory assertions in pleadings, affidavits, or declarations. *Albanil v. Coast 2 Coast, Inc.*, No. H-08-486, 2008 U.S. Dist. Lexis 93035, at *9-10 (S.D. Tex. Nov. 17, 2008); *Songer v. Dillon Res., Inc.*, 569 F. Supp. 2d 703, 706 (N.D. Tex. 2008) ("While the plaintiffs' burden at [the notice] stage is not onerous, neither is it invisible."); *Treme v. HKA Enters., Inc.*, 2008 WL 941777 (W.D. La. Apr. 7, 2008) ("[U]ncorroborated assertions, without more, do not fulfill the plaintiff's burden under *Lusardi*."); *Aguirre*, 2006 WL 964554, at *19 (holding that brief and conclusory statements in plaintiffs' complaint and motion for notice are insufficient); *Prizmic v. Armour, Inc.*, 2006 WL 1662614, at *2 (E.D.N.Y. 2006) (noting that merely accepting conclusory allegations could lead to a "frivolous fishing expedition conducted by the plaintiff at the employer's expense").

Here, Plaintiff has not presented any credible evidence to support his Motion. He has not offered an admissible declaration or affidavit. Plaintiff has merely attached to his Motion an unsigned, undated document that is titled "Declaration of Kurtis Rooks" (Doc. 13-1).

Although 28 U.S.C. § 1746 allows a witness to forego the obligation of appearing before a notary, the statute does not authorize declarations that are unsigned and undated. The "Declaration of Kurtis Rooks" is clearly blank as to both his signature and date. An unsigned and undated declaration does not conform with the statutory requirements of 28 U.S.C. § 1746 and is incompetent evidence. *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988) ("It is a settled rule in this circuit that an unsworn affidavit is incompetent to raise a fact issue precluding summary judgment."); *White v. Allstate Ins. Co.*, 513 F. Supp. 2d 674, 680 (E.D. La. 2007) ("The Court finds that because the First White Declaration is unsigned and undated, it does not comport with 28 U.S.C. § 1746."); *Pijuan, et al. v. Gen. Biomedical Serv., Inc.*, 1994 WL 543605, *2 (E.D. La.) (unsworn, self-serving declaration held insufficient).

Plaintiff's failure to sign and date his purported declaration renders it meaningless. The information contained in the purported declaration cannot be considered as credible evidence supporting Plaintiff's Motion. Therefore, Plaintiff's Motion lacks evidentiary support and must be denied.

**D. Plaintiff's request for telephone numbers is improper.**

Even if the Court determines that notice should be sent to potential plaintiffs, the Court should deny Plaintiff's request that Coastal be ordered to provide telephone numbers for its current and former employees. The names and addresses are sufficient to make sure the potential plaintiffs receive notice of this case. Providing Plaintiff additional information, including phone numbers of potential plaintiffs, invades those individual's privacy interests. *See Behnken v. Luminant Min. Co., LLC*, 3:13-CV-2667-D, 2014 WL 585333, at *11 (N.D. Tex. Feb. 14, 2014)

(Fitzwater, C.J.) ("Because doing so will improve the accuracy of the notice, and, as a result, minimize undue delay, the court grants plaintiffs' request as to the names and last known addresses but denies it as to the telephone numbers. Consistent with its prior practice, the court concludes that the need for compelled disclosure of prospective class members' telephone numbers is outweighed by their privacy interests, and that there is no apparent reason to conclude that sending a letter to a person's last known address will be inadequate."); *Page v. Nova Healthcare Mgmt., L.L.P.*, Civ. A. H-12-2093, 2013 WL 4782749, at *7 (S.D. Tex. Sept. 6, 2013) (Lake, J.) (declining to order production of potential plaintiffs' telephone numbers "because of the highly private and sensitive nature of this information").

Plaintiff has requested the Court's permission to send numerous mailings to potential plaintiffs. Plaintiff wants to send a court-authorized notice by both U.S. Mail and email. Plaintiff has not offered any reason why additional contact information is necessary, so the Court should not require Coastal to produce any telephone numbers. *See Lopez v. Bombay Pizza Co.*, Civ. A. H-11-4217, 2012 WL 5397192, at *3 (S.D. Tex. Nov. 5, 2012) (Miller, J.) (declining to require defendant to produce telephone numbers because plaintiff "has not demonstrated any need for the additional information at this stage of this case").

## III. CONCLUSION

Coastal requests that the Court deny Plaintiff's Motion for Conditional Certification and grant it all other relief to which it is entitled.

Respectfully submitted,

*/s/ John B. Brown*

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**ATTORNEYS FOR DEFENDANT COASTAL CHEMICAL CO., LLC**

**CERTIFICATE OF SERVICE**

I hereby certify that on this January 3, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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